In the

United States Circuit Court of Appeals

For the Ninth Circuit

No. 5456 5021

DAVE NIELSEN, CHARLES NIELSEN and JAMES E. REECE,

Plaintiffs in Error

VS.

UNITED STATES OF AMERICA,

Defendant in Error

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

HON. E. E. CUSHMAN, District Judge

Brief of Plaintiffs in Error

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STATEMENT OF THE CASE

About the 18th of May, 1926, along the bank of the upper Nisqually river, prohibition officers Croxall and Lambert, together with Deputy Sheriff Paul Jeffery and Theodore Mohrbacher, discovered a still.

In connection with the still there was discovered a large mash vat containing mash in a high state of fermentation, a number of empty kegs, and barrels containing some whiskey, but not filled. Adjacent to this still, which was in operation, and which had apparently been in operation for some time, there was found a considerable quantity of sacked granulated white sugar, commonly known as "sea island sugar."

About a thousand feet from where the still, mash vat and the paraphernalia incident to distilling operations were located, and at the head of the general trail leading to the road from the river, and the still as well, was an abandoned logging camp where were situated a number of small houses and a barn, which was used as a garage; and there, in the garage, were found three automobiles. There was the Buick touring car belonging to the defendant Dave Nielsen, a Chevrolet coupe belonging to the defendant Charles Nielsen and a Ford touring car belonging to the defendant James E. Reese. All of these cars were together. The back seats of the two touring cars had been removed and were in the houses, where they were being used as seats. The officers thereupon proceeded to search without warrant, and did search without warrant, one of the cabins, being

the cabin occupied by a man named Noland Nelson, who was afterward indicted as a defendant in this case, but the indictment against him was subsequently nolled at the opening of the trial. In this house, which was the residence of Noland Nelson, was found a small quantity of whiskey in a pint bottle in a pasteboard box covered with clothing and personal effects. This was taken by the officers making the search. (Tr., p. 55.)

After being indicted, Noland Nelson petitioned the court to suppress this whiskey as evidence in the case. (Tr., pp. 6 and 7.)

It appeared on the part of the Government, in its attempt to sustain the validity of the search, by the testimony of one Mark Y. Croxall, a prohibition agent, that the search was made under his direction by deputy sheriffs of Pierce County, who then and there found the whiskey (Tr., p. 28), and upon that showing the District Court made an order denying the petition to suppress (Tr., p. 28). It may be remarked here that in the trial of the case this same officer, Mark Y. Croxall, in testifying for the Government in chief, testified that it was not the deputy sheriffs who discovered the liquor, but Lambert, another prohibition officer, acting in his capacity as such. (Tr., p. 34.)

The defendants Dave Nielsen, Charles Nielsen and James E. Reese were, after the indictment was dismissed as to Noland Nelson, called to the bar of the court on the 25th day of June, 1926, and were placed on trial before a jury.

Mark Y. Croxall was called as the first witness for the Government. He described the conditions surrounding the still and testified that no men were seen or identified, and undertook to testify as follows with reference to Exhibit No. 3 of the Government, which is a bottle of whiskey having been found in Noland Nelson's cabin:

"We entered Nelson's house.

Q. (By defendants' counsel): Did you have a warrant for that?

MR. GORDON (For the Government): Objected to as immaterial.

THE COURT: Objection sustained.

MR. WOODS (Defendants' counsel): Exception.

WITNESS (continuing): The bottle of whiskey was found in Nelson's cabin on the bed." (Tr., p. 42.)

The same witness testified further as follows:

"Calling my attention to Government's Exhibit No. 3, for identification, that is a part of a pint of liquor that was found in the cabin. It has the same flavor and the same taste as that found at the still. The flavor is distinc-

tive. I recognize the flavor and taste of the whiskey found at the still and that in this bottle marked Government's Exhibit 3 for identification, as having been tasted by me before. It has a peculiar flavor. I do not know how I would describe it, any more than I know the difference in flavors of anything I taste. I had tasted it twice before near the Oscar Nielsen place. * * * Oscar Nielsen is a brother of Dave Nielsen. * * * I do not know whether Dave was living at the Oscar Nielsen place at the time or not. I know that I arrested him there.

MR. WOODS (For the defendants): I object to that. Do you mean to say you arrested him there on this charge involved in this case?

A: Not in this case. Not in this case; no.

THE COURT: Objection overruled. Was it before this case?

A: Yes.

MR. WOODS: Exception. * * *

WITNESS CONTINUING: Some whiskey was found in the barn on Oscar Nielsen's place. The same party found it at the still where Dave Nielsen was.

Q: Did you find Dave Nielsen at that still?

A: Yes."

Whereupon counsel for the defendant objected and saved his exception.

"WITNESS CONTINUING: Dave Nielsen was running the still.

Q: (District Attorney) Was he afterwards charged with that offense in this court?

A: He was.

Q: What was his plea, if any, to that charge?

A: Plea of guilty.

MR. WOODS: We object to that, and move to strike the answer.

MR. GORDON: This is merely for the purpose of showing that the whiskey that Dave Nielsen admitted two years ago having manufactured was identical in kind, taste and odor with this whiskey that was found in this still on May 18th, 1926, at the place alleged in the indictment."

Thereupon the court overruled the objection and motion, and the defendants, and each of them, saved their exception. (Tr., pp. 34-39.)

The testimony of the Government continuing was to like effect by the other witnesses introduced, all of which tended to show that the defendants, and each of them, owned the respective cars described; and that they were probably in the vicinity along the river at that time; and that they had occupied the cabins or houses where the search was made. It was also shown that there were groceries in the house, as well as fishing tackle and a fishing basket partly filled with corks, which was not identified as belonging to any of the defendants, and a number of sugar sacks about the premises as well. There was also found a sack full of copper clippings

similar to the copper from which the still was made, which sack was about 100 feet in the rear of one of the cabins in the brush.

There was also found among the groceries in the house, and as a part of the groceries, a small quantity of white granulated sugar, referred to as "Sea Island Sugar." (Tr., p. 54.)

It was also discovered that a part of the mash in the distillery vat consisted of white corn meal. (Tr., p. 31.) This mash, which takes from three to seven days' setting to ferment, according to the temperature and conditions, was in a high state of fermentation. (Tr., p. 31.)

There was also found in the coupe of Charles Nielsen some pulverized grains of corn meal. There was also found on the floor of the Ford touring car belonging to Reece a small quantity of corn meal. Charles Nielsen, however, explained the presence of the corn meal. Reece did likewise. It is a fact that Reece had only purchased his car in Tacoma on the evening of the 15th day of May, or less than 36 hours before the raid upon the still. (Tr., p. 82.)

This was the extent of the testimony, either direct or circumstantial, offered by the Government.

At the close of the Government's testimony the defendants, and each of them, moved the court for

an instructed verdict of dismissal, which motions were all by the court overruled, and exception allowed the defendants. (Tr., p. 63.)

No further testimony was offered by the Government than that herein stated to connect the offense of Dave Nielsen committed two years ago with the defendants in this case; and, at the close of the Government's case, the defendants, and each of them, moved the court to strike the testimony of Mark Y. Croxall and to withdraw it from the consideration of the jury, which testimony related to the arrest and plea of guilty of Dave Nielsen about two years ago for the manufacture and possession of liquor. This motion was by the court overruled and exception allowed the defendants. (Tr., pp. 63-64.)

Thereupon the defendants Charles Nielsen and James E. Reece in their own behalf testified in substance as follows:

Charles Nielsen testified that he had never been arrested and had voluntarily appeared in the case for trial. That on the day on which the officers discovered the still he was in the vicinity on a fishing trip; and that he had arranged to meet the defendant Reece, who was a timber cruiser; and that he stopped at the cabin the night before; and

that Dave Nielsen came the next morning. That Reece then proceeded on a cruising trip, and that he (Charles Nielsen), with his brother, Dave Nielsen, proceeded on their fishing trip. (Tr., p. 84.)

Reece testified to similar effect. Each of them denied any knowledge of the still or the whiskey, and especially denied any conspiracy to violate the laws of the United States. Numerous character witnesses were offered on the part of the defendants, and each of them.

Counsel for Dave Nielsen called as a witness S. W. Austin, who testified in substance and effect that he was a merchant at Graham and that he had seen Dave Nielsen at work on his farm in the vicinity of Eatonville; and that he (Dave Nielsen) was a married man with a family and a considerable and successful farmer in that vicinity. That he had seen him working on his farm practically every day up to the time the officers discovered this still. (Tr., p. 73.) The witness then identified a paper which was shown him, namely, defendants' Exhibit A-4, for identification, as a bill of goods that he had sold Dave Nielsen on the 17th day of May, the first item on the list being two fishing lines.

Thereupon the following proceedings were had and done in that connection:

"Q: (By defendants' counsel) Did you know about his (Dave Nielsen's) going fishing?

A: Yes. When he was buying fishing tackle he made the remark that he was going fishing.

MR. GORDON: I object to what he said and ask the jury be instructed to disregard it.

THE COURT: Objection sustained. The jury will disregard what was said.

MR. WOODS: (For the defendants) Exception. (Tr., p. 74.)

Dave Nielsen was not sworn and did not testify as a witness in the case.

Defendants were each convicted. They interposed their timely motion for a new trial, which was denied, saving them their exceptions, and sentence was thereupon pronounced by the court.

From that judgment and sentence and the proceedings upon which it is based, this writ of error is prosecuted.

ASSIGNMENT OF ERRORS CLAIMED BY DAVE NIELSEN

I.

The Court erred in denying the petition of Noland Nelson to suppress evidence, *i. e.*: A small quantity of whiskey found in a shack occupied by said Noland Nelson as his home, which said home was searched without warrant of law. (Pp. 4 and 5, Bill of Exceptions.)

In that connection, the Court further erred in excluding testimony as follows:

> MARK Y. CROXALL: (Cross examination) We entered Nelson's house.
>
> Q: Did you have a warrant for that?
>
> MR. GORDON: (District Attorney) Objected to as immaterial.
>
> THE COURT: Objection sustained.
>
> MR. WOODS: Exception.
>
> WITNESS CONTINUING: The bottle of whiskey was found in Nelson's cabin on the bed. (Said bottle of whiskey referred to being marked Government's Exhibit No. 3.) (Pp. 16 and 17, Bill of Exceptions.)

II.

The Court erred in permitting the witness Mark Y. Croxall to testify as follows:

> MR. CROXALL: I do not know whether Dave (Nielsen) was living at the Oscar Nelson

place at the time or not. I know I arrested him there.

MR. WOODS: I object to that. Do you mean to say you arrested him there on this charge involved in this case?

A: Not in this case, no.

THE COURT: Objection overruled. Was it before this case?

A: Yes.

THE COURT: Objection overruled.

MR. WOODS: Exception. * * *

MR. WRIGHT: The defendant Reece objects to that evidence as being entitrely too remote, and in no way connecting him with it.

THE COURT: Objection will be overruled. * * *

MR. WRIGHT: Exception.

THE COURT: Allowed. (Pp. 10 and 11, Bill of Exceptions.)

The Court further erred in permitting the witness Mark Y. Croxall to testify further as follows:

Q: (By the District Attorney) At the time you have spoken of (referring to an occasion about two or three years ago), when you drank some whiskey that tasted like this near Oscar Nielsen's cabin, where did you find that whiskey?

A: Some whiskey was found in the barn on Oscar Nielsen's place. The same party found it at the still where Dave Nielsen was.

Q: Did you find Dave Nielsen at that still?

A: Yes.

MR. WOODS: We object to that for the further reason that there is no contention of an overt act at that time. The only contention as to an overt act is these set forth in the complaint here made.

THE COURT: You are not confined to overt acts to show the arrest of the defendant Dave Nielsen. Objection overruled.

MR. WOODS: Exception.

Q: What was Dave Nielsen doing apparently at the still at that time two years ago?

A: He was running the still.

Q: Was he afterwards charged with that offense in this court?

A: He was.

Q: What was his plea to that charge?

A: Plea of guilty.

MR. WOODS: We object to that, and move to strike the answer.

THE COURT: Objection overruled.

MR. WOODS: We note an exception.

THE COURT: Exception allowed.

MR. WRIGHT: May it be understood that the objection of the defendant James Reece goes to this evidence as being too remote; and may we have an exception to the ruling?

THE COURT: Exception allowed. (Pp. 12, 13 and 14, Bill of Exceptions.)

III.

The Court erred in admitting Government's Exhibit No. 3.

IV.

The Court erred in overruling the motion of the defendant Dave Nielsen for an instructed verdict at the close of the Government's case. (P. 35, Bill of Exceptions.)

V.

The Court erred in overruling the motion of the defendant Dave Nielsen to strike the testimony of Mark Y. Croxall and to withdraw it from the consideration of the jury, said testitmony being all of the testimony relating to the arrest and plea of guilty of Dave Nielsen more than two years ago. (P. 37, Bill of Exceptions.)

VI.

The Court erred in sustaining the objection of the Government and instructing the jury to disregard the following testimony of S. W. Austin:

> Q: (By Mr. Woods for the defendants Nielsen) Did you know about his going fishing?
>
> A: Yes. When he was buying fishing tackle he made the remark that he was going fishing.

MR. GORDON: I object to what he said and ask the jury be instructed to disregard it.

THE COURT: Objection sustained. The jury will disregard what was aid.

MR. WOODS: Exception.

THE COURT: Exception allowed. (P. 45, Bill of Exceptions.)

VII.

The Court erred in overruling the motion of the defendant Dave Nielsen in arrest of judgment.

VIII.

The Court erred in overruling the motion of the defendant Dave Nielsen for a new trial.

IX.

The Court erred in pronouncing judgment and sentence against the defendant Dave Nielsen.

ASSIGNMENT OF ERRORS CLAIMED BY CHARLES NIELSEN

I.

The Court erred in denying the petition of Noland Nelson to suppress evidence, *i. e.*, a small quantity of whiskey found in a shack occupied by said Noland Nelson as his home, which said home was searched without warrant of law. (Pp. 4 and 5, Bill of Exceptions.)

In that connection, the Court further erred in excluding testimony as follows:

> MARK Y CROXALL: (Cross examination) We entered Nelson's house.
>
> Q: Did you have a warrant for that?
>
> MR. GORDON: (District Attorney) Objected to as immaterial.
>
> THE COURT: Objection sustained.
>
> WITNESS CONTINUING: The bottle of whiskey was found in Nelson's cabin on the bed. (Said bottle of whiskey referred to being marked Government's Exhibit No. 3.) (Pp. 16 and 17, Bill of Exceptions.)

II.

The Court erred in permitting the witness Mark Y. Croxall to testify as follows:

> MR. CROXALL: I do not know whether Dave (Nielsen) was living at the Oscar Niel-

sen place at the time or not. I know I arrested him there.

MR. WOODS: I object to that. Do you mean to say you arrested him there on this charge involved in this case?

A: No in this case, no.

THE COURT: Objection overruled. Was it before this case?

A: Yes.

THE COURT: Objection overruled.

MR. WOODS: Exception. * * *

MR. WRIGHT: The defendant Reese objects to that evidence as being entirely too remote, and in no way connecting him with it.

THE COURT: Objection will be overruled. * * *

MR. WRIGHT: Exception.

THE COURT: Allowed. (Pp. 10 and 11, Bill of Exceptions.)

The Court further erred in permitting the witness Mark Y. Croxall to testify further as follows:

Q: (By the District Attorney) At the time you have spoken of, (referring to and occasion about two or three years ago) when you drank some whiskey that tasted like this near Oscar Nielsen's cabin, where did you find that whiskey?

A: Some whiskey was found in the barn on Oscar Nielsen's place. The same party found it at the still where Dave Nielsen was.

Q: Did you find Dave Nielsen at that still?

A: Yes.

MR. WOODS: We object to that for the further reason that there is no contention of an overt act at that time. The only contention as to an overt act is these set forth in the complaint here made.

THE COURT: You are not confined to overt acts to show the arrest of the defendant Dave Nielsen. Objection overruled.

MR. WOODS: Exception.

Q: What was Dave Nielsen doing, apparently, at the still at that time two years ago?

A: He was running the still.

Q: Was he afterwards charged with that offense in this Court?

A: He was.

Q: What was his plea to that charge?

A: Plea of guilty.

MR. WOODS: We object to that, and move to strike the answer.

THE COURT: Objection overruled.

MR. WOODS: We note an exception.

THE COURT: Exception allowed.

MR. WRIGHT: May it be understood that the objection of the defendant James Reese goes to this evidence as being too remote; and may we have an exception to the ruling?

THE COURT: Exception allowed. (Pp. 12, 13 and 14, Bill of Exceptions.)

III.

The Court erred in admitting Government's Exhibit No. 3.

IV.

The Court erred in overruling the motion of the defendant Charles Nielsen for an instructed verdict at the close of the Government's case. (P. 35, Bill of Exceptions.)

V.

The Court erred in overruling the motion of the defendant Charles Nielsen to strike the testimony of Mark Y. Croxall and to withdraw it from the consideration of the jury, said testimony being all of the testimony relating to the arrest and plea of guilty of Dave Nielsen more than two years ago. (P. 37, Bill of Exceptions.)

VI.

The Court erred in sustaining the objection of the Government and instructing the jury to disregard the following testimony of S. W. Austin:

> Q: (By Mr. Woods for the defendants Nielsen) Did you know about his going fishing?
>
> A: Yes. When he was buying fishing tackle he made the remark that he was going fishing.

MR. GORDON: I object to what he said and ask the jury be instructed to disregard it.

THE COURT: Objection sustained. The jury will disregard what was said.

MR. WOODS: Exception.

THE COURT: Exception allowed. (P. 45, Bill of Exceptions.)

VII.

The Court erred in overruling the motion of the defendant Charles Nielsen in arrest of judgment.

VIII.

The Court erred in overruling the motion of the defendant Charles Nielsen for a new trial.

IX.

The Court erred in pronouncing judgment and sentence against the defendant Charles Nielsen.

ASSIGNMENT OF ERRORS CLAIMED BY JAMES E. REESE

I.

The Court erred in denying the petition of Noland Nelson to suppress evidence, *i. e.*, a small quantity of whiskey found in a shack occupied by said Noland Nelson as his home, which said home was searched without warrant of law. (Pp. 4 and 5, Bill of Exceptions.)

In that connection, the Court further erred in excluding testimony as follows:

> MARK X. CROXALL: (Cross examination) We entered Nelson's house.
>
> Q: Did you have a warrant for that?
>
> MR. GORDON: (District attorney) Objected to as immaterial.
>
> THE COURT: Objection sustained.
>
> MR. WOODS: Exception.
>
> WITNESS CONTINUING: The bottle of whiskey was found in Nelson's cabin on the bed. (Said bottle of whiskey referred to being marked Governoment's Exhibit No. 3.) (Pp. 16 and 17, Bill of Exceptions.)

II.

The Court erred in placing the defendant James E. Reese upon trial without arraignment or plea to the Indictment.

III.

The Court erred in permitting the witness Mark Y. Croxall to testify as follows:

> MR. CROXALL: I do not know whether Dave (Nielsen) was living at the Oscar Nielsen place at the time or not. I know I arrested him there.
>
> MR. WOODS: I object to that. Do you mean to say you arrested him there on this charge involved in this case?
>
> A: Not in this case, no.
>
> THE COURT: Objection overruled. Was it before this case?
>
> A: Yes.
>
> THE COURT: Objection overruled.
>
> MR. WOODS: Exception. * * *
>
> MR. WRIGHT: The defendant Reese objects to that evidence as being entirely too remote, and in no way connecting him with it.
>
> THE COURT: Objection will be overruled. * * *
>
> MR. WRIGHT: Exception.
>
> THE COURT: Allowed. (Pp. 10 and 11, Bill of Exceptions.)

The Court further erred in permitting the witness Mark Y. Croxall to testify further as follows:

> Q: (By the District Attorney) At the time you have spoken of, (referring to an occasion about two or three years ago) when

you drank some whiskey that tasted like this near Oscar Nielsen's cabin, where did you find that whiskey?

A: Some whiskey was found in the barn on Oscar Nielsen's place. The same party found it at the still where Dave Nielsen was.

Q: Did you find Dave Nielsen at that still?

A: Yes.

MR. WOODS: We object to that for the further reason that there is no contention of an overt act at that time. The only contention as to an overt act is these set forth in the complaint here made.

THE COURT: You are not confined to overt acts to show the arrest of the defendant Dave Nielsen. Objection overruled.

MR. WOODS: Exception.

Q: What was Dave Nielsen doing, apparently, at the still at that time two years ago?

A: He was running the still.

Q: Was he afterwards charged with that offense in this Court?

A: He was.

Q: What was his plea to that charge?

A: Plea of guilty.

MR. WOODS: We object to that, and move to strike the answer.

THE COURT: Objection overruled.

MR. WOODS: We note an exception.

THE COURT: Exception allowed.

MR. WRIGHT: May it be understood that the objection of the defendant James Reese goes to this evidence as being too remote; and may we have an exception to the ruling?

THE COURT: Exception allowed. (Pp. 12, 13 and 14, Bill of Exceptions.)

IV.

The Court erred in admitting Government's Exhibit No. 3.

V.

The Court erred in overruling the motion of the defendant James E. Reese to strike the testimony of Mark Y. Croxall and to withdraw it from the consideration of the jury, said testimony being all of the testimony relating to the arrest and plea of guilty of Dave Nielsen more than two years ago. (P. 37, Bill of Exceptions.)

VI.

The Court erred in overruling the motion of the defendant Reese, at the close of all of the Government's testimony, to dismiss. (Pp. 37 and 38, Bill of Exceptions.)

VII.

The Court erred in overruling the motion of the defendant James E. Reese in arrest of judgment.

VIII.

The Court erred in overruling the motion of the defendant James E. Reese for a new trial.

IX.

The Court erred in pronouncing judgment and sentence against the defendant James E. Reese.

ARGUMENT ON BEHALF OF PLAINTIFF IN ERROR DAVE NIELSEN

Under his claim or error, the plaintiff in error Dave Nielsen will argue what he claims to be the errors of the trial court under three general heads, within which all of the claimed errors, except the insufficiency of the evidence to justify the verdict, naturally and logically fall and which it might be well to restate, for the purpose of clarity, as follows:

First. The error of the trial court in admitting all evidence concerning the bottle of whiskey which was found in the home of Noland Nelson. Under this general classification will naturally fall Assignments 1 and 3, and Assignment 2 will be closely co-related therewith.

Second. The error of the trial court in permitting evidence to go to the jury touching the arrest

and plea of guilty of Dave Nielsen two years before. Under this general head will fall Assignments of Error 2, 4 and 5.

Third. The error of the trial court in refusing to permit the witness Austin to testify on behalf of Dave Nielsen as to his expressed purpose at the time he bought the fishing tackle on the day before he was present in the general locality of the still. Under this general head will fall Assignment of Error number 6. Assignment of Error number 8, of course, which charges error in the refusal of the court to grant a new trial, need not be separately discussed.

UNLAWFUL SEARCH AND SEIZURE

Prohibition Officer Croxall was in charge of the raiding party which entered the cabin or home of Noland Nelson, and there discovered and later produced in evidence a bottle of whiskey marked Government's Exhibit No. 3. (Tr., p. 34.)

Noland Nelson, who was a co-defendant of the plaintiffs in erorr, was jointly indicted with them. He petitioned the court to suppress the evidence obtained in what he conceived to be an unlawful search. The reason for the trial court's ruling does not appear in the record, but if counsel for plaintiffs in error are correctly informed, it was based

upon the fact that it appeared that the actual entry and seizure was made by State officers, namely, three deputy sheriffs of Pierce County; and that no actual unlawful search was made by the Government officers; and that, therefore, the court was without authority to discipline the State officers. In any event, whether such reason for the ruling appears or not, that is the only theory, as we view the law and the facts pertinent in this case, upon which the trial court could have justified the search of the home of Noland Nelson, assuming it could be justified at all. That the search was in fact actually made by officers of the United States, subject to the discipline of the District Court, appears by the testimony of Mark Y. Croxall himself. The substance of his testimony follows:

"That on the 18th day of May, 1926, in company with three deputy sheriffs for Pierce County, without warrant he (witness) went to the residence of the defendant Noland Nelson, and that there said deputy sheriffs for Pierce County, acting at the direction of the witness, an officer of the United States Government, searched said premises and there found the evidence sought to be suppressed." (Tr. p. 28.)

A great number of cases might be cited to sustain the position of the plaintiffs in error that the

trial court erred in his view of the law, and that the fruits of the unlawful search upon the petition of Noland Nelson should have been suppressed. One of the leading cases in recent years is the case of *Week v. United States*, 232 U. S. 383; 58 L. Ed. 52, decided by the Supreme Court in 1914. Without trespassing upon the time of the court to review the reasons advanced in this case, as well as in earlier cases, which reasons of course are familiar to this court, we desire to point out that in the Weeks case, especially, the search was actually made in the first instance by police officers of Kansas City, and later on the search was completed by police officers acting under the direction of a United States Marshal. The facts, therefore, were very similar to those in the case at bar.

The court in no uncertain terms held that, inasmuch as officers of the United States Government were party to the violation of the constitutional rights of the defendant, they became subject to the discipline of the Federal courts and the evidence secured was thereby rendered incompetent.

Cases may be found which hold that where the search is made by State or City officers, the mere presence of a Federal officer will not invalidate the search where such search was not made under his direction. But no case may be found which goes

further than that. In the case at bar, it will be observed by the testimony of Croxall himself, who was the Federal officer in charge of the search:

> "That said sheriffs for Pierce County, acting at the direction of the witness, an officer of the United States Government, searched said premises and there found" * * * (Tr., p. 28.)

It follows, of course, without citation of authority, that if the State officers were acting under the direction or at the direction of the Federal officer, the Federal officer was in charge of the search and in control of the search, and that the search was his search. Plain and ordinary rules of agency would require this view and no other.

But, we do not stop there, for the case must be considered in its entirety; and it appears that when this witness Croxall was called on the Government's case in chief, the motion to suppress having been happily disposed of, he was equally explicit in his statement that the search was made and the liquor discovered by Richard A. Lambert, who led the party into the cabin and made the search and actually discovered the liquor, and that Richard A. Lambert was a Federal prohibition agent. (Tr., p. 34.) That, of course, was not before the trial court at the time he passed upon the petition to suppress, but it was before the court when the interrogatory

was propounded to Croxall as to whether or not he had a search warrant for the entry of the premises, and the trial court sustained the objection of the District Attorney upon the stated ground of immateriality. (Tr., p. 42.)

The argument will probably be made on behalf of the Government that the right to suppress evidence unlawfully obtained is a right personal to the defendant whose home or rights have been invaded. This we concede to be the general rule, but it must be remembered that this is a conspiracy case, that the three plaintiffs in error and Noland Nelson were all facing trial upon the same indictment, and that Noland Nelson did avail himself of his right by his application timely made to suppress the evidence unlawfully obtained.

Briefing counsel were not trial counsel in that case, but we may assume from the practice of counsel, as we know it to be usually followed in like cases, that counsel for all of the defendants were in accord; and that the petition was filed at the particular instance of Noland Nelson because Noland Nelson, as the regular occupant of the house, was perhaps better fitted to claim that right than the transient occupants, Reece and Nielsen. However, any of them might have successfully prosecuted his petition to suppress upon the same

grounds, and the decision would doubtless have been the same. The ruling was made and the defendants reserved their exceptions to that ruling and perfected their record thereby. They relied upon the claim of error that had been preserved by Noland Nelson, and it was not until after they had been called to the bar of the court for trial and their time for filing such a petition on their own behalf had expired by the calling of the jury, that the Government saw fit to attempt to cure what apparently was the error of the trial court, by dismissing as against Noland Nelson, whose claim of error was then complete.

But, we go further in our claim than this. We urge that this error was complete when the court's ruling was made; that the search in the first instance having been unlawful, the evidence became wholly incompetent when Noland Nelson invoked the constitutional guaranty and petitioned for the suppression of the evidence. That evidence, then, we claim, became dead, it having been unlawfully obtained, when Noland Nelson, being a defendant and claiming his rights as a defendant, invoked the constitutional guaranty; and, thenceforth, it was the duty of the court to exclude and suppress the articles found for all purposes. This was a conspiracy case, and what affected one defendant af-

fected all; and, if error had been committed, as we contend, by the trial court, and if such error affected, as it certainly would, each and all of the defendants, we submit that no subsequent act of the District Attorney by his manipulation of pleas could make the record wholesome.

Conceding, as we do, the wide latitude allowed in the introduction of proof in conspiracy cases, this evidence upon the filing of the petition was rendered incompetent and nothing subsequently could happen to restore its competency, and no rule may be found in any case which admits incompetent evidence. The prejudice resulting from the introduction of that evidence will more clearly appear as we proceed to the argument under the next general assignment.

UNWARRANTED PROOF OF DISCONNECTED CRIMES OR OTHER OFFENSES

Dave Nielsen did not take the stand. That he would not take the stand was apparently surmised by the District Attorney and the prohibition officers, as the Government proceeded to make its case in chief. There was no direct evidence connecting or tending to connect any of the defendants with the crime charged. The Government must rely upon circumstantial evidence, as we have pointed

out in the Statement. This circumstantial evidence was weak in the extreme, giving rise, as it must have given rise, to the belief in the minds of the prosecutors that a jury could scarcely arrive at the conclusion that all of the facts claimed—admitting them to be facts—were inconsistent with the reasonable hypothesis that the defendants were, as many other men were at that season of the year, embarked upon their lawful pursuits—in the one instance, as sportsmen fishing the stream; and in the other as cruising a tract of nearby timber. It became necessary, then, for the Government to link up this simple expedition with something sinister that would tend to convince the jury that the venture was a criminal one and not a lawful one. To do so by the introduction of relevant evidence seemed impossible.

Dave Nielsen, years before, had made some liquor. He had been apprehended and had frankly pleaded guilty and paid the full penalty for that unfortunate venture. If it could be brought to the knowledge of the jury that one of the three men charged, namely, Dave Nielsen, had theretofore been convicted, the inference would follow that he was a known distiller; and inference might be drawn from inference that he was engaged in that avocation at this place fifty miles from his home.

Of course, this evidence could not be relevant under the well-settled rules in like cases. It has been many times decided that disconnected offenses, even of similar nature, or even in conspiracy cases, are irrelevant and may not be introduced in evidence.

One of the leading cases among the many which might be cited is the well considered case of *Miller et al. v. United States*, 133 Fed. 337. Particular attention of the court is called to the discussion on pages 353 and 354 of that Opinion, wherein precisely the same question is discussed as would be involved in the instant case if the Government had attempted to introduce evidence of that prior offense without resort to subterfuge.

In a recent case decided in August, 1926, that of *Mercer v. United States*, 14 Fed. (Second) 281, which seems to be directly in point in the present case, it is said that in a prosecution for conspiracy and use of the mails to defraud through sale of corporate stock, where the defendant did not testify, it was error to permit the prosecuting attorney by questions asked witnesses to disclose prior conviction of the defendant for forgery and fraud.

Other recent cases which establish this well known rule of evidence is that of *Grantello v. United States*, 3 Fed. (Second) 117; *Crowley v.*

United States, 8 Fed. (Second) 118; *Wansbach v. United States*, 11 Fed. (Second) 221; and *Cucchia, et al. v. United States*, 19 Fed. (Second) 86.

The district attorney doubtless realized the application of the rule of law indicated by these cases, for he made no attempt to prove the disconnected offense except by the subterfuge which we shall presently discuss. But rules of law and evidence are of small moment where professional witnesses, skilled in court procedure, are willing to furnish a connecting link, based upon truth or falsehood, to connect up those things which otherwise are disassociated.

In order to make relevant this prior offense, which otherwise would have been irrelevant under the authorities, the Government called upon this same Mark Y. Croxall, to whom we have heretofore referred, who, in the hearing upon the application to suppress testimony, undertook to make the testimony competent by showing that the search was made and the discovery made by deputy sheriffs, and who, upon being called as a witness in the case in chief, finding that the momentary exigencies of his case seemed to require it, was equally willing to and did testify that the entry was made and the search was made by the Government agents. Croxall then undertook to testify that when he tasted the

liquor, which was found in the bottle in Noland Nelson's house, he recognized the fact that it had a peculiar flavor. His delicate senses were so attuned that he not only knew that it was the same liquor that came from the still a thousand feet away, but he knew as well that it tasted the same as some liquor that he had tasted two years or more before at a time when he arrested Dave Nielsen, who then pleaded guilty to manufacture and possession at a point some 55 miles away. The ostensible force of this testimony, if believed, of course, was to carry conviction that the whiskey in the bottle in the cabin occupied by all four defendants was whiskey which came from the still a thousand feet away; and, furthermore, it was Dave Nielsen's whiskey or whiskey which Dave Nielsen had retained from his stock of two years before—in any event, that it was Dave Nielsen's whiskey, recognized as such by its peculiar flavor, but its real purpose was to apprise the jury that Dave Nielsen had suffered a prior conviction. The plaintiffs in error argue that this testimony by Croxall, already shown by the record to be a witness careless of the truth, was so apparently a subterfuge and a sham that the trial court should have so ruled.

Let us examine this incredible testimony of Croxall in the light of reason to ascertain whether

or not it is a vehicle upon which the otherwise irrelevant testimony could have been transported into the case. In the first place, if the records of the District Court and this court import verity, not only hundreds, but thousands of amateur distillers have placed their various brands and kinds of liquor upon the market in Western Washington, and within a radius of less than 50 miles from the place where Croxall's delicate senses were first assailed by the peculiar flavor of the whiskey he tasted two years before. In the second place, Croxall, even assuming that he undertook to testify as an expert, does not pretend that he had tasted all of the brands or substantially all of the brands of whiskey made in that locality, and, unless he had, he certainly could not be in a position to undertake to say that the peculiarity of the flavor of this liquor was identifiable with the defendant Dave Nielsen, and the most he undertakes to say is that the whiskey had a peculiar flavor.

It may not be amiss to say that the writers of this brief, basing their statement upon personal knowledge as well as hearsay, are prepared to assert that all of this Western Washington moonshine has a peculiar flavor.

The point we make, however, is that Croxall by his testimony was a prohibition agent and it was

a part of his business to taste and test liquor for alcoholic content. He had been engaged in that business for many years. Presumably, he had tasted thousands of brands of liquor, and presumably when Dave Nielsen pleaded guilty two years before to the manufacture and possession of liquor, the case against him was closed and forgotten. It is hardly to be assumed that the taste of that whiskey lingered in the memory of the prohibition agent; and it seems incredible that two years after, upon the banks of the Nisqually River, 50 miles away, the flavor and aroma of this whiskey found in a partly empty pint bottle in a paper carton covered by old clothes and personal effects, should have carried his memory back over an uncharted course through his thousands of experiences, to his early love of two years before. The statement rapes reason and challenges human credulity; and we submit that it bears upon its face the prints and marks of falsehood and may not be taken for exactly other than what it is—a pretense and a subterfuge whereby the witness undertook to make relevant what the law has declared irrelevant.

Even assuming that Dave Nielsen had made the whiskey, which was found in the bottle in the cabin, it is almost impossible to believe that it would have had the same flavor as whiskey made by him two

years before. To have, it would necessarily, of course, require—if we may notice the natural phenomena surrounding such things—that it was made under exactly the same physical conditions, with exactly the same physical ingredients, with the same water, under the same temperature, with the same kind of paraphernalia, and was exactly the same in age and maturity. We submit in all sincerity that it was the duty of the trial court to use ordinary human intelligence to determine whether or not this testimony of Croxall was a subterfuge and a sham; and, if it was, to refuse to permit it to carry into the case the very damaging and prejudicial testimony that Dave Nielsen, the alleged co-conspirator of Reece and Charles Nielsen, had theretofore been convicted or pleaded guilty in effect to identically the same offense as that with which he was here charged.

In the first instance, when this testimony was offered, the trial court appears to have permitted its introduction upon the theory that he did not know what testimony might be introduced to connect up these alleged conspirators with those to the grand jury unknown. It was upon that theory alone that he first admitted the testimony. (Tr., p. 36.)

However that may be, whether the trial court erred in that regard or not, we respectfully submit that when no further effort was made to connect the prior offense of Dave Nielsen with the case at bar, and the defendants at the close of the Government's case moved, as they did, to strike that testimony and to remove it from the consideration of the jury, it became the plain duty of the District Court to so order and so instruct, and in failing to do we submit the District Court committed prejudicial error.

REFUSAL OF COURT TO RECEIVE STATEMENTS EXPLANATORY OF ACTS

Under this third general head, the plaintiffs in error will discuss assignment of error No. 8.

S. W. Austin, it will be remembered, was a general merchant in the town of Graham, the trading center adjacent to the farm of Dave Nielsen. On the evening of the 17th day of May, that is, the night before the morning on which the officers went to the scene of the still and discovered the still on the upper Nisqually River, as well as the night before the morning when Dave Nielsen went to that general location on his fishing trip, as he claims, it appeared that Dave Nielsen purchased from Austin two fishing lines,—this on the eve of his departure.

Austin was then asked if he knew about his (Dave Nielsen's) going fishing. He replied that he did, that Nielsen had said, when he bought the fishing lines, that he was going fishing in the morning. This testimony the District Attorney moved be stricken and taken from the consideration of the jury, which motion, over the objection of the defendants, the court granted, and the jury was thereupon instructed accordingly. In this, we claim, lies error. The court presumably struck the testimony upon the theory that it was hearsay and self-serving in its nature.

The general rule of law is perhaps best stated by Mr. Wigmore in his work on Evidence, Vol. 1, p. 34, in which it is said:

> "The second axiom, on which our law of evidence rests, is this: *All facts, having rational probative value, are admissible, unless some specific rule forbids.* It has been otherwise expressed as follows by Professor James Bradley Thayer, 'Presumptions and the Law of Evidence,' 3 Harvard Law Review 143: 'There is another precept which it is convenient to lay down as a preliminary one in stating the law of evidence, viz., that, unless excluded by some rule or principle of law, all that is logically probative is admissible. This general admissibility of what is logically probative is not, like the former precept, a necessary presupposition in a rational system of evidence, * * * but yet * * * it is important to notice this also as being a fundamental proposition. In a

historical sense, it has not been the fundamental rule to which the various exclusions were exceptions * * * (But) the main propositions which I have stated should, in the order of thought, be first laid down and always kept in mind.'

"This axiom expresses the truth that legal proof, though it has peculiar rules of its own, does not intend to vary without cause from what is generally accepted in the rational process of life; and that of such variations some vindication may, in theory, always be demanded. In other words, in the system of evidence the rules of exclusion are, in their ultimate relation, rules of exception to a general admissibility of all that is rational and probative."

That the defendant Dave Nielsen said, when he bought the fishing lines on the eve preceding his discovery near the still, that he was going fishing as explanatory of his intent and purpose in going to that locality, is, of course, rationally of probative value. It tends to explain and does explain to the rational mind, bent upon inquiry, his purpose in visiting the scene or locality where his automobile was found and where he doubtless was earlier in the day. It is, then, under the general rule, unless it falls within one of the well defined exceptions which the law has created to exclude it. Those exceptions are, in so far as they are pertinent to this inquiry, that it is hearsay and that it is self-serving. Under the general hearsay rule or exception

it is true that hearsay testimony, so-called, is not admissible; but the exception to the rule or the exception to this general exception is as well founded in the law as the rule or exception itself. This exception rests upon the necessity in certain cases of resorting to hearsay, coupled with the fact that hearsay in such cases is subjected to some sanction and test other than, but deemed equivalent to, the ordinary ones, thereby insuring its trustworthiness, and rendering extremely improbable its falsity. It has induced the law to recognize many exceptions to the rule and to allow the admission of hearsay as competent evidence thereunder.

Encyclopaedia of Evidence, Vol. 6, p. 446.

It is generally held that declarations which are so intimately connected with the principal fact or transaction as to constitute a part of it and to characterize and explain it are admissible as a part of the *res gestae*. The rule, as we have said, is well settled and the difficulty lies not so much in a declaration of the principle as in an application of it to each particular case. Those declarations proven by hearsay have sometimes been referred to by authors as "spoken acts" for the reason that the words used in conjunction with the act become a part of the act itself. They are competent under the general rule, unless under the peculiar circum-

stances of the case it may seem likely to the judge that they have been manufactured in advance to support the needs of the declarant.

Did the facts in this case warrant such an inference by the trial judge? We believe not. In the first place, it cannot be disputed and will not be argued, but that the defendant Dave Nielsen purchased the fish lines—and purchased them, too, on the evening before he made his trip to the general locality of the still. This was proven beyond question. For what purpose would a man ordinarily purchase fish lines? They could not be used in connection with distilling operations. They could be used, and likely would be used, by one going fishing. The declaration by the defendant that he was going fishing at that time fell naturally from his lips as a part of the act, and became to that extent his "spoken act".

It is highly improbable that either the purchase of the fish lines or the declaration as to his purpose were a part of a plan prepared in advance to meet a condition which did not then exist, namely, an explanation to be furnished to the arresting officers or the court that might be called upon to try his case. It must be remembered that at the time the declaration was made no arrest had been made, no search, so far as Dave Nielsen knew, was in pro-

gress or contemplated, no officers were in the vicinity or expected to be, otherwise it logically follows the defendant would not have been in that locality at or near that time.

Suppose, if we may, a parallel case, not connected with the violation of a liquor law, where the rule may be laid down without the prejudice usually incident to the trial of liquor cases. A man is found dead along the railroad track. His representative sues for his wrongful death, claiming that he was a passenger upon the railway train, and that by reason of some defect of appliance or want of care deceased was thrown from the train and death ensued. No other evidence might be available as to whether or not he was actually a passenger upon that train. It would not be argued, we venture, that his widow would be denied the right to testify that shortly before the departure of the train he came home, packed his bag and said he was embarking on that particular train for a given destination. That would be, in the words of the authorities, the "spoken act," explanatory of his other conduct proven by the observers, a part of the *res gestae* and therefore competent under the general exception to the exception to the rule.

It may seem that this assignment of error is of minor importance, but it must be remembered that

the facts and circumstances in this case, upon which the Government relied for a conviction, excluding the unfair inference that might and probably was drawn from the testimony touching Dave Nielsen's plea of guilty two years before, were weak in the extreme; and, aside from the wrongful admission of exclusion of evidence, prejudice is presumed.

We earnestly but respectfully submit that this explanation, if the jury had not been cautioned against its reception, might have in the instant case served to carry conviction of a lawful instead of an unlawful purpose on the part of Dave Nielsen in visiting the locality.

The fourth assignment of error of this plaintiff in error, namely, that the court erred in overruling the motion of the defendant Dave Nielsen for an instructed verdict at the close of the Government's case, we submit becomes manifest upon the reading of the bill of exceptions; and that the question became a question of law for the court and not a question of fact for the jury under the well established rules of law applicable thereto.

Without further discussion of this assignment of error, the plaintiff in error Dave Nielsen will and does adopt the argument addressed to the court by his co-plaintiffs in error, Charles Nielsen and James E. Reece, upon this subject.

ARGUMENT ON BEHALF OF CHARLES NIELSEN and JAMES E. REECE

The plaintiffs in error Charles Nielsen and James E. Reece adopt without repetition the argument thus far advanced on behalf of their co-plaintiff in error, Dave Nielsen.

In that connection these plaintiffs in error further urge that these plaintiffs in error were co-defendants with the defendant Dave Nielsen; and that the admission, if it was wrongful as to Dave Nielsen, of Government's Exhibit No. 3, being the bottle of whiskey found in the cabin unlawfully searched, was equally damaging or more damaging to the cause of these plaintiffs in error than it was to the cause of Dave Nielsen himself. These plaintiffs in error urge in that conenction that they stood before the court and jury without previous record. Their sins, if any they had committed, consisted wholly in being in the vicinity with and associated with Dave Nielsen. If it was wrongfully proven that the liquor was the product of the still of Dave Nielsen, that wrong reflected itself in the verdict against these plaintiffs in error. If it was wrongfully proven that Dave Nielsen had suffered a conviction for exactly the same offense for which he now stood trial, that error reflected itself in the trial of these plaintiffs in error. They were

charged with conspiracy with Dave Nielsen and whatever was wrongfully introduced tending to blacken the character of Dave Nielsen in the eyes of the jury, would be doubly harmful and doubtless was doubly harmful to the cause of these plaintiffs in error.

These plaintiffs in error desire to urge on their own behalf assignment of error four, on behalf of Charles Nielsen, and assignment of error six, on behalf of James E. Reece, which assigmnents are the same though differently numbered, namely, that the court erred in refusing to sustain the challenge of each of the defendants to the sufficiency of the evidence at the close of the Government's case.

The evidence, as has been remarked before, was purely circumstantial. There was no direct evidence connecting or tending to connect any of the defendants with the distilling operations. Let us review briefly what the evidence on the part of the Government, taking it as a whole, showed. It showed that the automobile of Dave Nielsen, the automobile of Charles Nielsen and the automobile of James E. Reece were practically parked together and all vacant. The logical inference follows, of course, and it was later admitted, that Dave Nielsen, Charles Nielsen and James E. Reece were in that general locality on the morning when the offi-

cers raided the still. It remained then to show for what purpose they were there. Evidence was then introduced to the effect that there was corn meal in the vats at the still; and that the fermentation process had already occupied from three to seven days, according to the temperature and surrounding conditions, so that the corn meal which the officers found at the still had been there for at least a period of three days. Evidence was then introduced to the effect that in the rear of Charles Nielsen's coupe was found a little corn meal; and that in the bottom of the Ford touring car of Reece was found some grains of corn meal. The purpose of that testimony, we assume, on the part of the Government—if that had any probative force at all—was to prove that Charles Nielsen and James E. Reece had, by the use of their cars, transported corn meal to the scene of the distilling operations. This testimony loses its entire force and effect, if it had any in the first place, when it appears, as it does appear, that the automobile of James E. Reece had only been purchased by him on the evening of the 15th day of May. (Tr., p. 82.) That the car had a temporary license plate the Auditor's record shows. It was applied for on the 15th day of May; and he had not had possession of the automobile for over 36 hours, whereas, the corn meal found in the

vats would of necessity have been on the scene from a period of anywhere from three to seven days.

The other circumstances relied upon are these: That an ordinary sugar sack was found under the seat of the car of Charles Nielsen, being described as a sack bearing the brand "Sea Island Sugar". No claim is made that Sea Island Sugar is anything more than a brand, or perhaps a trade name for the larger portion of the white granulated sugar commonly upon the market. There were a number of empty sugar sacks, bearing the same brand, found about the premises, and when the sugar sack in Charles Nielsen's car was placed there or from where it came does not appear.

There is no other circumstance in the entire case which even remotely connected or tended to connect Charles Nielsen or James E. Reece with the operation of the still, saving, of course, their association with Dave Nielsen, against whom was introduced the damaging and unwarranted testimony that he had two years before been engaged in the distilling business. No claim is made that Charles Nielsen or James E. Reece had anything to do with the prior operations of Dave Nielsen or that James E. Reece ever knew or had an opportunity to know of those prior operations, or that he was even acquainted with Dave Nielsen up to that time.

Under this situation, it seems to the writers of this brief that the question as to whether or not the circumstances proven were such as to warrant the court in submitting the case to the jury became for the trial court a question of law.

District Judge Munger in the case of *United States v. Richards*, 149 Fed. 454, has aptly stated the law in the following language:

> "Circumstantial evidence to warrant a conviction in a criminal case must be of such a character as to exclude every reasonable hypothesis but that of guilt of the offense imputed to the defendant, or, in other words, the facts proved must all be consistent with and point to his guilt only, and inconsistent with his innocence. The hypothesis of guilt should flow naturally from the facts proven and be consistent with them all. If the evidence can be reconciled either with the theory of innocence or with guilt, the law requires that the defendant be given the benefit of the doubt, and that the theory of innocence be adopted."

Do the facts, as we have outlined them here and as the record discloses them in this case, meet the test included in that charge? We submit that they do not approach it and that the minds of reasonable men may not differ upon that question; and, if that is true, the District Court should have removed the case from the consideration of the jury and instructed accordingly, and his error in refusing was not cured by any subsequent evidence

elicited from the defendants' witnesses after the ruling was made, as obviously appears from a review of the record.

The errors of which we have here complained on behalf of each and all of the plaintiffs in error, with all due respect to the courts, we are constrained to say would not have occurred in any case except a case arising under the National Prohibition Act. It seems to us that there is a tendency on the part of trial courts to relax the rules of ancient usage and to lightly pass over constitutional rights made for the benefit of the prisoner at the bar where the question is one of liquor violation. Whether we be correct or not in our sincere belief in that respect, we earnestly urge that the well established laws and rules that protect the rights of the perpetrator of fraud whose gainful occupation is to rob the widow and orphan should not be denied the citizen who is charged with a violation of the laws under the 18th Amendment. His rights should receive the same respect and the same consideration as the rights of the more hardened and more dangerous criminal.

Mr. Justice Reynolds of the Supreme Court of the United States, in the case of *Carroll v. United States*, 45 Sup. Ct. Rep., 280, says:

"The damnable character of the 'bootlegger's' business should not close our eyes to the mischief which will surely follow any attempt to destroy it by unwarranted methods. 'To press forward to a great principle by breaking through every other great principle that stands in the way of its establishment; * * * in short, to procure an eminent good by means that are unlawful, is as little consonant to private morality as to public justice.' "—(Sir William Scott.)

We respectfully submit that in the case at bar the plaintiffs in error did not have a fair trial, and that the errors complained of were committed to their manifest prejudice; and that the court erred in refusing to grant them a new trial.

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